In the

Supreme Court of the United States

OCTOBER TERM, 1952

No. 258

THE BALTIMORE AND OHIO RAILROAD COMPANY, BOSTON AND MAINE RAILROAD, ERIE RAILROAD COMPANY, *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND TEXAS CITRUS AND VEGETABLE GROWERS AND SHIPPERS,

Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

BRIEF FOR TEXAS CITRUS AND VEGETABLE GROWERS AND SHIPPERS, APPELLEE

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Date: December 8, 1952.

WARLICK LAW PRINTING COMPANY — *Law Brief Printing* — Dallas — HArwood-9350

INDEX

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1. QUESTIONS PRESENTED

This Court is not yet confronted with the three questions raised by Appellants on page 2 of their brief. The sole question before the Court at this time is whether the trial court abused its discretion in granting motions to dismiss the complaint on the ground that it did not state a cause of action.

2. STATEMENT OF THE CASE

Appellants' statement of the case on pages 3 to 5, incl., of their brief omits the following important facts:

(a) The petition filed with the Interstate Commerce Commission on March 16, 1951 (R. 48-58), for further hearing to submit additional evidence did not comply with Rule 101 of the Commission's Rules of Practice in that it did not show that the evidence to be submitted was relevant or give any satisfactory explanation as to why it was not offered at the two previous hearings.

(b) The rates prescribed by the Commission were and are approximately 200 per cent of the rates on the same vegetables which have been voluntarily maintained and applied from the same origins to southwestern destinations for more than twelve years (R. 16 and 86).

(c) The rates prescribed by the Commission yield from 16.7 mills to 23.8 mills per ton miles whereas the present rates on the same vegetables from California to the same destinations yield from 10.0 mills to 18.8 mills per ton mile, and the California rates have been voluntarily maintained and applied by Appellants for many years (R. 44-A, 45 and 87-89).

(d) To many destinations in the territory covered by the order of the Commission the prescribed rates resulted in no reduction in revenue because combinations of local rates in effect at the time the order was issued result in lower through charges than can be obtained under the prescribed scale of rates (R. 44-A and 87).

(e) The complaint contained conflicting allegations. On the one hand it alleged that the prescribed rates would yield revenue less than the cost of providing service (R. 79). On the other hand it alleged that the prescribed rates were and are substantially higher than rates which Appellants have voluntarily maintained and applied on like traffic for many years (R. 16, 44-A, 86, 87-89).

(f) Motions referred to on page 5 of Appellants' brief were not filed contemporaneously. Motion to dismiss by this Appellee was filed five days prior to Appellants' motions to stay and remand. Motions to dismiss were based on the ground that "the complaint fails to state a cause of action." (R. 83.) The trial court did say that Appellants should have submitted all of their evidence to the Commission at one of the two hearings previously held in this case, but the motions to dismiss were granted because the trial court apparently agreed that the complaint fails to state a cause of action.

3. SUMMARY OF ARGUMENT

The primary question at issue is whether the trial court abused its discretion in granting motions to dismiss. For the purpose of those motions, all facts stated in the exhibits attached to and made a part of the complaint must be taken as true. In case of conflict between the exhibits and conclusions stated in the complaint, the facts in the exhibit must control.

Appellants do not contend that the order of the Commission was not supported by substantial evidence or that the

order was issued without adequate hearings. The Commission held two separate hearings, a proposed report was issued, exceptions were filed by all parties and the case was orally argued. But Appellants contend that the Commission acted arbitrarily and capriciously in refusing to grant a third hearing, based on a petition which did not comply with the Commission's Rules of Practice. This, they contend, results in taking their property without due process of law.

The complaint shows that the Commission had under consideration a relationship case involving rates on vegetables from Texas to all destinations in the United States. It considered the general level of rates on vegetables from Arizona, California and New Mexico to the same destinations and the general level of rates within the Southwest, all of which have been voluntarily maintained and applied by Appellants for many years. It found that the rates under attack on certain vegetables to certain destinations were substantially in excess of the Southwestern level and the level voluntarily maintained from Arizona, California and New Mexico origins to the same destinations and were unreasonable. It prescribed reductions in the rates on certain vegetables from Texas to a portion of the destinations involved but the prescribed rates are still higher on the average than other rates which have been voluntarily maintained and applied by Appellants for many years.

Based on all of the facts shown in the complaint, the trial court correctly held that the complaint did not state a cause of action, that it did not show that the Commission had

acted arbitrarily or abused its discretion and that the facts alleged do not show that the prescribed rates are confiscatory. The trial court's decision will not affect past or future practices as to submission of evidence dealing with the reasonableness of rates in either relationship cases or revenue cases.

The trial court acted within its discretionary power in granting motions to dismiss. Motion to affirm should be granted. The order of the trial court should be affirmed.

4. ARGUMENT

A. The Complaint, Considered in Its Entirety, Will Not Justify Setting Aside the Commission's Order

The primary question at issue in this case is whether the trial court abused its discretion in granting motions to dismiss the complaint, as amended, because it did not state a cause of action. In their brief Appellants stress two main points as follows:

First, for the purposes of a motion to dismiss, facts alleged in the complaint must be taken as true. (Page 6.)

Second, determination of the issue of confiscation is a judicial question which must be determined by a court. (Page 10.)

Under the first point they contend that the trial court should have looked at only a part of the complaint. In Paragraph IX of the complaint (R. 78), it is alleged that *the refusal of the Commission to grant a rehearing was:*

(a) arbitrary and capricious

(b) an abuse of its discretion

(c) deprivation of property without due process of law.

In Paragraph X (R. 79), it is alleged that the Commission's order would deprive plaintiffs of their property without due process of law.

But Exhibits 1 and 4 (R. 9-47 and R. 60-68) were attached to the complaint and made a part thereof (R. 75). The facts found by the Commission and stated therein were not questioned. They show conclusively that Appellants have for years voluntarily maintained and applied rates substantially less than the rates prescribed in this case. Those facts must also be taken as true for the purposes of the motions to dismiss. They must be considered along with the other allegations. In case of conflict, the exhibits control.

This is a suit to test the validity of a rate order issued by the Interstate Commerce Commission. Such orders, operating, in futuro, cannot be annulled and set aside by the courts unless:

(a) They are unsupported by evidence

(b) They are made without a hearing

(c) They exceed constitutional limits

(d) They are arbitrary and amount to an abuse of power.

Board of Trade of Kansas City v. United States, 314 U. S. 534, 546.

Neither the complaint nor the petitions to the Commission alleged that the decision and order are unsupported by substantial evidence.

The complaint does not allege that the Commission failed to grant plaintiffs a full and complete hearing. Two hearings were held in June, 1949, one at Harlingen, Texas, and one at Los Angeles, Calif. The hearings lasted four days and Appellants were given full opportunity to introduce any relevant testimony they had to offer. A proposed report was served by the Commission's Examiner, exceptions were filed and the case was orally argued before the entire Commission at Washington. The first decision was handed down December 21, 1950 (R. 9), eighteen months after the hearings closed. The case was reopened for further consideration and a supplemental decision and order were issued January 7, 1952 (R. 60).

The allegations of the complaint as to whether the order exceeds constitutional limits will be discussed in Section C of this argument.

B. No Abuse of Discretion Shown in Complaint

Paragraph IX of the complaint (R. 78) states that the refusal to grant a rehearing was "arbitrary and capricious and an abuse of its discretion." That is merely a conclusion and no facts are alleged showing that the Commission was arbitrary, capricious or abused its discretion. Exhibits 3 and 4 (R. 59-68) show that a further hearing on the existing record was granted but plaintiffs were not permitted

to present additional evidence. Below we give a brief chronological history of the case before the Commission.

Complaint was filed with the Commission August 24, 1948. Hearings were held in Harlingen, Texas, June 15, 1949, and in Los Angeles, Calif., June 23, 1949. The two hearings lasted four days and the abstract of facts comprises 613 pages of oral testimony and 115 rate and statistical exhibits many of which comprise as many as 50 pages 13 inches by 17 inches in size. Appellants introduced considerable testimony regarding the cost of handling vegetables (R. 30-31) and they were permitted to submit all relevant testimony offered. The presiding examiner rendered a proposed report, all parties were permitted to file exceptions thereto and the case was orally argued before the entire Commission at Washington. The decision of the Commission was handed down December 21, 1950. Then, and not until then, did plaintiffs offer to submit the testimony as to costs referred to in Exhibit 2 (R. 48-50). That petition was not filed until March 16, 1951.

In reply to a motion to dismiss on the ground that the complaint did not state a cause of action, Appellants stated:

> "The gravamen of plaintiffs' cause is that plaintiffs have not had a hearing at which time they can assert their constitutional rights." (R. 119.)

The failure to grant the third hearing for receipt of evidence which was not previously offered seems to be the real basis for this suit. We are aware that Mr. Gray stated (R. 124) that is only part of the allegations in the complaint, but the language of the complaint indicates that

the foregoing quoted statement is correct. We shall refer to that statement later under Section C of this argument.

Rule 101, Paragraphs (b) and (e), of the Commission's Rules of Practice, of which this Court may take judicial notice, reads as follows:

> "(b) *Rehearing or further hearing.*—When in a petition filed under this rule opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced."
>
> "(e) *Time for filing.*—Except for good cause shown, and upon leave granted, petitions under this rule must be filed within 30 days after the date of service of a decision or order granting an application in whole or in part, and within 60 days after the date of service of any other character of decision or order."

The first petition for a third hearing (Ex. 2, R. 48), filed March 16, 1951, nearly three months after service of the order, does not show that the evidence the Appellants desired to submit was newly discovered evidence, that it was relevant to the issues involved or that there was any logical reason for not offering it at one of the previous hearings. The following reasons contained in the petition are not logical reasons:

> "Such evidence was not available to these Defendants at the time of the prior hearings, *since the prescribed basis was not then known.*" (R. 50.) (Emphasis supplied.)
>
> * * * * *
>
> "Petitioners could not properly assume that the Commission would prescribe *rates lower than the costs to defendants* of rendering the service, and, therefore,

their omission to introduce cost of service evidence at the prior hearings *does not foreclose them from offering such evidence of confiscation* at a further hearing." (R. 51.) (Emphasis supplied.)

In the first place, Appellants knew what rates were being proposed by the Complainant before the Commission. They were much lower than the Commission prescribed. To illustrate, we show below in cents per 100 lbs. the rates proposed at certain distances compared with the prescribed rates for those distances:

Distance Miles	*Minimum 28,000 pounds*		*Minimum 20,000 pounds*	
	Prescribed	*Proposed*	*Prescribed*	*Proposed*
700	101	79	120	94
1200	130	112	145	129
1800	158	138	173	158

(R. 18, 66 and 91)

If the prescribed rates made them want to introduce cost evidence, the proposed rates should have made them much more anxious to offer evidence to show that Complainant's proposal was confiscatory. Instead they sat quietly by until the case had been handled to conclusion and decided on December 21, 1950. Then they waited until March 16, 1951, before they filed their petition for further hearing. (R. 48.)

In the second place, Appellants were presuming a great deal when they charged the Commission with prescribing rates "lower than the costs to defendants." That is a matter of proof. The Commission had a record of considerable size. It knew that Appellants had voluntarily published and

maintained for 12 years to the Southwest rates approximately 50% of the prescribed rates. (R. 16 and 86.) It knew that Appellants had voluntarily maintained and applied for many years rates from California which yield 10.0 mills to 16.4 mills per ton mile while the prescribed rates to the same destinations from Texas would yield from 16.7 mills to 19.2 mills per ton mile (R. 44-A, 45, 87-89.) It takes more than a mere unverified tabulation of figures to convince the Commission that the prescribed rates are lower than costs. It knew that Appellants were not losing money on the rates they have voluntarily maintained and applied for so many years. However, the Commission did reopen the case and reconsider it on the record as made (R. 59 and 60).

Why didn't Appellants ask for further hearing when they filed their exceptions to the Examiner's proposed report? Why didn't they ask for further hearing before the case was orally argued before the entire Commission? The answer is very plain. By waiting to file the petition for rehearing until after the case was decided they hoped to delay the effectiveness of the order for another two-year period. If the Commission elected to not grant a third hearing, then they hoped to get an injunction in the Courts under the plea of confiscation.

The petition for a further hearing to submit new evidence was a plea to the discretion of the Commission, especially since it did not conform with the Commission's rules of practice and had been so long delayed. If the Commission were required to grant such applications it would

become standard procedure for railroads to withhold cost evidence until after a case is decided. Then, if adverse to them, they would ask and obtain a further hearing for the submission of evidence which, if relevant, should have been submitted at the original hearing.

In *United States v. Northern Pacific Co., 288 U. S. 490*, this Court had under consideration a situation somewhat similar to this case in that the railroads sat quietly by until the case went against them. Then they sought a rehearing. The District Court enjoined the Commission's order. This Court reversed the case and sustained the Commission's order, stating:

> "Though the order substantially reduced the carriers' revenues, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligence in bringing this matter to the Commission's attention deprived them of any equity to complain of the refusal of their petition. They sat silent and took the chance of a favorable decision on the record as made. They should not be permitted to reopen the case for the introdution of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order." (494.)

In *Interstate Commerce Commission v. Jersey City, 322 U. S. 503*, this Court at page 514 pointed out the difficulty of ever consummating the administrative process if the Courts required further hearings in cases of this kind. It held that the granting of a further hearing under such circumstances is within the discretion of the body making the

order, not the reviewing body. That holding was reaffirmed in *United States v. Pierce Auto Freight Lines 327 U. S. 515, 535.*

This complaint does not allege any facts showing that the Commission was arbitrary or capricious or that it abused its discretion. Cost studies of the nature shown in Exhibit 2 (R. 48-58) are not relevant in relationship cases of this kind. As stated by Appellants on page 17 of their brief:

> "evidence with respect to costs is not usually necessary and it is not the general practice to introduce such evidence."

Contrary to their statement on page 19 of their brief, the decision of the District Court will not require any change in this practice. In relationship cases the level of rates will be determined in the future, as in the past, by the general level of other rates on the same or like commodities moving under similar circumstances or conditions. In revenue cases, such as *Increased Freight Rates, 1951, 284 I. C. C. 589*, the level of rates will be determined in the future, as in the past, by evidence as to transportation costs.

The complaint, considered in its entirety, clearly shows that the Commission did not act arbitrarily or abuse its discretion in refusing to grant a third hearing to receive further testimony of the nature described by Appellants in their petition of March 16, 1951 (R. 48), and their petition of February 15, 1952 (R. 69).

C. No Allegations That Order Exceeds Constitutional Limits

In their brief Appellants proceed on the theory that they have plead a case of confiscation. They even go so far as to say on page 7 that the District Court admits the existence of confiscation. On page 11 they say:

> "This means the judgment of the District Court sanctions the imposition of admittedly 'confiscatory rates."

These statements are amazing.

A careful reading of the trial court's opinion indicates that it accepted the statement of Appellants that the gravamen of their complaint was that the Commission had not granted them a third hearing for the purpose of asserting alleged constitutional rights. See the following statement at page 148 of the record:

> "The plaintiffs here seek to relitigate a factual question involved in the proceeding before the Commission on which they initially elected not to present evidence."

As we understand the Court's opinion (R. 146-149), it was concerned primarily with the allegations that the Commission was arbitrary and capricious and had abused its discretion. The Court referred to an allegation that the prescribed rates were confiscatory but it granted motions to dismiss on the ground that:

> "the complaint fails to state a cause of action." (R. 83.)

Instead of admitting the existence of confiscation, we think the Court understood that the complaint does not even allege confiscation.

Paragraph VII of the complaint (R. 77-78) infers that the prescribed rates are confiscatory, without making that direct allegation. Paragraph VIII mentions "confiscatory rates" (R. 78) but makes no such allegation. Paragraph IX alleges that *the refusal to grant a further hearing* "deprived plaintiffs of their property without due process of law." (R. 78.) Paragraph X (R. 79) alleges that the prescribed rates

> "will yield to the carriers affected by the order * * * revenue less than the costs of providing the service covered by said rates."

That is all that is alleged about confiscation. On the other hand, Exhibit 1 (R. 9 to 47), attached to and made a part of the complaint (R. 75), contains the following facts.

The prescribed rates are approximately 200 per cent of the rates on vegetables which Appellants have voluntarily maintained and applied from Texas origins to Southwestern destinations for twelve years. For instance, the minimum revenue per car at 700 miles under the prescribed rates at the 28,000 pound minimum is $282.80 compared with $122.66 under the voluntary rates. At the 20,000 pound minimum, the prescribed minimum revenue for that distance is $240.00 compared with $146.02 under the voluntary rates. Those rates have now been increased 15 per cent. (R. 16, 66 and 86.) The prescribed charges at that

distance, including the 15 per cent increase, are 231 per cent and 164 per cent of the charges which Appellants voluntarily maintain and apply.

The prescribed rates yield from 16.7 mills to 23.8 mills per ton mile while Appellants have for many years maintained and applied on the same vegetables from California to the same destinations rates which yield only 10.0 mills to 18.8 mills per ton mile. (R. 44-A, 45 and 87-89.) The rates from California apply over routes through the Rocky Mountains over which the Commission has generally prescribed rates 15 per cent higher than in the territory east of the Rockies. *Fresh and Green Vegetables from Idaho and Oregon, 253 I. C. C. 143, 149-150.*

Neither the trial court nor this Court can assume that Appellants have been voluntarily continuing for twelve or more years rates that yield less than the cost of service. The foregoing facts, therefore, completely refute the statement in Paragraph X that the prescribed rates yield less revenue than the cost of service. In case of conflict between the typed allegations and facts shown in the exhibits attached to and made a part of the pleadings, the exhibits control. *Simmons v. Peavy-Welsh Lumber Co., 113 F. 2d 812, Cert. Denied, 311 U. S. 685.*

The prescription of railroad freight rates involves two steps of substantially different character. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of the rate schedule conforming to that level, so as to eliminate dis-

criminations and unfairness from its details. *Federal Power Commission v. Natural Gas Pipe Line Co., 315 U. S. 575, 584.*

Cases of the first type are called revenue cases and are illustrated by Ex Parte 162, 166, 168 and 175, decided by the Commission in the last six years, the latest decision being handed down April 11, 1952. See *Increased Freight Rates, 1951, Ex Parte 175, 284 I. C. C. 589.* In the latter case the Commission said that the extraordinary defense efforts require a rail transportation system adequate to meet the needs of national defense and *"warrants a degree of liberality* in decision not otherwise to be taken into account" (emphasis ours). It further stated:

> "We are not convinced that money necessary for capital additions to the railway system should be derived wholly from income, but we must take note of the fact that many of these outlays are being made under the encouragement, if not the insistence, of the Government and the shipping public, with national defense primarily in mind. Such circumstances, therefore, bear upon our decision in this case." (661.)

Freight rates on vegetables within the Southwest have been increased 71 per cent, with a maximum of 54 cents per 100 lbs, since June 1, 1946, with even greater increases to Official Territory. It is clear from the foregoing statement by the Commission that in revenue cases it has attempted to keep the general level of freight rates high enough to yield a fair return on the value of property used for transportation service. Now it is even going further

and is exercising a degree of liberality beyond that required by ordinary conditions.

The order here under attack was issued in a relationship case of the second type,—not a revenue case. The order was issued for the purpose of lining up the rates on vegetables from Texas to certain destinations more nearly on the level voluntarily published by these plaintiffs from other areas and within the Southwest. The order reduced the rates on carrots from Texas to certain destinations in Official, Western Trunk-Line and Southern Territories. It reduced the rates on other vegetables (except cabbage, onions and potatoes) to a part of Official Territory only. But the newly prescribed rates are still on a higher basis than from Arizona, California and New Mexico to the same destinations and on a higher basis than from Texas to Southwestern destinations.

Exhibit 1 (R. 27) shows that the present per-ton-mile revenue on various vegetables from Harlingen, Texas, to New York City range from 18.3 mills to 20.0 mills per ton mile, compared with 13.5 mills per ton mile from Salinas, Calif. The average distance from Grants, N. M., to Eastern Territory Group A is 195 miles farther than from Harlingen, Texas, but the average rate is 18 cents per 100 pounds cheaper than from Harlingen (Exhibit 1, R. 21). The rates from Grants, N. M., were voluntarily published by Appellants and connections and must be assumed to yield a fair return.

Appendix B, Exhibit 1 (R. 45), shows rates on carrots from Arizona, California and Texas to fourteen destinations. No rates were prescribed to Chicago, Ill., and St. Louis, Mo. To other destinations the prescribed rates yield from 15.8 mills to 23.8 mills per ton mile, compared with 12.0 mills to 18.8 mills from Arizona and California (R. 45 and 89).

The "due process" clause of the Fifth Amendment can not be invoked without specifically alleging facts from which it must clearly appear that the act complained of will deny to the utility the just compensation safeguarded to it. *Beaumont, S. L. & W. R. R. Co. v. U. S., 282 U. S. 74.* A mere statement that the prescribed rates yield less than costs and take property without due process of law (R. 79) is not sufficient, especially when Exhibit 1 (R. 9 to 47) and Exhibit 4 (R. 60 to 68), attached to and made a part of the complaint, clearly refute those statements. The voluntary rates from Texas to the Southwest have been in effect since 1940 and the voluntary rates from Arizona, California and New Mexico have been in effect much longer than that, except for general increases. They yield substantially less revenue than the prescribed rates here under attack. The Court can not assume that Appellants would voluntarily maintain and apply sub-confiscatory rates for twelve years or more.

The facts shown in Exhibits 1 and 4 refute the unsupported conclusion that the prescribed rates are less than the cost of service and take Appellants' property without due process of law.

5. CONCLUSION

There is a strong presumption in favor of the legality of administrative action in cases of this kind. Such orders can not be set aside unless the complaint states facts showing the Commission flagrantly violated the legal rights of parties before it. This complaint fails to state such facts. Further, the facts stated show that the Commission did not violate the legal rights of Appellants. Motion to affirm filed by this appellee on July 14, 1952, should be granted and the order of the trial court should be in all things affirmed.

Respectfully submitted,

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Date: December 8, 1952.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief upon the parties named below by mailing a copy thereof by first class United States mail properly, addressed, to each party.

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Dated at Dallas, Texas, this 8th day of December, 1952.

FRANK A. LEFFINGWELL.